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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 141

THE CONFEDERATED BANDS OF UTE INDIANS,
Petitioners,

vs.

THE UNITED STATES

TITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Confederated Bands of Ute Indians, by their attorneys, pray that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above case on March 4, 1946.

Opinions Below

The opinion of the Court of Claims is as yet unreported but appears in the record at R. 11-38.

Jurisdiction

The judgment of the Court of Claims was entered March 4, 1946 (R. 43). The jurisdiction of this Court is invoked

under § 3(b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 28 U. S. C. § 288, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752.

The special jurisdictional act under which this case was instituted in the court below was the Act of June 28, 1938, c. 776, 52 Stat. 1209 (R. 5), as amended by the Acts of July 15, 1941, c. 299, 55 Stat. 593 (R. 10), and June 22, 1943, c. 135, 57 Stat. 160. The jurisdictional act contains no special provision for review on appeal to this Court. The provision of the Act of February 13, 1925, above, governing this Court's review of cases in the Court of Claims (28 U. S. C. § 288), under which this Court is authorized to review "*any case* in the Court of Claims", confers jurisdiction on this Court to review this case. *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 202-3 and note 3.

Questions Presented

1. A tribe of Indians ceded their reservation to the United States as trustee, the lands to be sold for the benefit of the Indians. To the knowledge of the United States, the Indians understood the cession as encompassing lands which at the time of the cession were a part of their reservation, having been made a part of it by an Executive order which had been proclaimed to settle a dispute between the Indians and the United States as to the territory reserved to the Indians by an earlier treaty with the United States. Is the United States liable for taking the Executive-order lands to its own use and profit, instead of selling them for the benefit of the Indians under the agreement?

Where a tribe of Indians reasonably understands its agreement with the United States in one way, and the United States understands it differently, which understanding of the agreement shall prevail?

2. Whether the Act of June 15, 1880, constituting an agreement between petitioners and respondent, has been properly construed.

3. Whether *Sioux Tribe* v. *United States*, 316 U. S. 317, (holding that an Executive order establishing an "Indian reservation" for the sole purpose of excluding liquor peddlers from the primary reservation of the Indians inferred no compensable interest in the Executive-order lands upon the Indians), can be applied, in order to excuse the United States from liability for taking the lands, to a case in which the Executive-order reservation was established in settlement of claims of the Indians to lands reserved by them under an earlier treaty, and where the Indians used and occupied the Executive-order lands and made a formal cession of all their lands in trust to the United States for sale for the benefit of the Indians.

4. Whether good faith in keeping the formal obligations of the United States to the Indians does not require review of this case on certiorari.

Statutes Involved

The material portions of the statutes involved are set forth in the record, as indicated.

Statement

This is a suit to recover for the taking of lands belonging to petitioners. In 1868 the parties entered into a treaty by which petitioners, after ceding a large area of their land, reserved certain areas in western Colorado for their own use. The north boundary line of the 1868 treaty reservation was not definitely located; and the first survey for that purpose was not made by the government until

1875. This survey disclosed what both parties believed to be a mistake as to the location of that boundary, both parties having understood it to lie farther north. To correct the location of that boundary, an Executive order was promulgated in 1875, adding to the reservation a strip of land about nine miles wide across the north end of the existing reservation. In 1880, by agreement ratified by Congress and by petitioners, it was provided that petitioners would give up their "present reservation" (which included the strip of land added by the Executive order), in return for which the United States agreed to make certain payments and provide other benefits for petitioners, sell the lands to which the United States acquires title, reimburse itself, and pay the balance of the proceeds of the lands to petitioners. Petitioner Indians understood that the Executive-order lands were part of their reservation which they owned and were ceding. Notwithstanding the undertaking by respondent to sell the lands for petitioners' account, an Executive order of August 4, 1882, 1 Kappler 834, restored this strip of land to the public domain. Proceeds of the sale of the acreage within this strip were retained by the United States, which has, since the Executive order of 1882, conducted itself as the proprietor of the lands and without regard to its trusteeship for petitioners under its Agrement of 1880. The Court of Claims held (R. 27-28) that petitioners did not have title to the lands added by the Executive order and therefore that the respondent did not undertake to sell such lands for the account and benefit of petitioners.

In detail, the facts are as follows:

Petitioners are a confederation of various bands of the Ute Tribe of Indians, who, by Treaty of March 2, 1868, 15 Stat. 619, 2 Kappler 990, ceded (Art. 3) all claim to their lands in the United States in exchange for a reservation

(Art. 2) in Colorado, bounded on the east by the 107th meridian, on the south and west by the southern and western boundaries of Colorado, and on the north by a line 15 miles north of the 40th parallel of north latitude. Finding 3, R. 12. The United States, in this treaty (Art. 4), agreed to establish two agencies "on the reservation," one of which, material in the present case, was to be on White River. Finding 5, R. 13.

The White River Agency was established during the latter part of 1869 at a place considered favorable for agency purposes, which was thought by the government and Indians alike to be south of the north boundary line. Finding 5, R. 13.

The Indians believed that their reservation encompassed lands considerably to the north of the agency; for they ordered miners on Douglass Creek [Wyoming], fifty miles north of the reservation, off their lands and complained of a proposed wagon road in the Bear [now Yampa] River Valley in northern Colorado on their own understanding that that was in their country. The agent at the White River Agency persistently requested a survey of the northern boundary in order to set the matter at rest. Finding 6, R. 13-14.

It was not until October or November, 1875—more than seven years after the treaty—that the northern boundary was finally surveyed. The survey showed that the line lay south even of the agency buildings—far south of where the Indians had understood from their treaty, and south even of where respondent's own agents had understood that it lay. Finding 7, R. 16-17. Upon information of these facts being communicated to Washington, the Commissioner of Indian Affairs (Finding 8, R. 19) and the Secretary of the Interior (Finding 9, R. 19) recommended the adoption of an Executive order adding a strip of land [about nine

miles in width] to the northern end of their reservation. The Executive order was promulgated by the President on November 22, 1875 (1 Kappler 834). By it this strip was "set apart for the use of the several tribes of Ute Indians, as an addition to their present reservation" in Colorado. Finding 10, R. 19-20.

The agent at White River was informed of the Executive order, was assured that it "fully protects your Indians in the peaceable possession of their improvements in the White River Valley and the Agency buildings," and would enable him to "assure the Indians of the exact location of the limits of their reservation as enlarged." Finding 11, R. 20. Accordingly, after the adoption of the Executive order was communicated to petitioners in 1875, it was understood by them, just as it was understood by respondent, that the lands added by the Executive order and which both parties had understood were meant to be encompassed by the reservation in the 1868 Treaty, were part of petitioners' reservation.

In this setting, an agreement was entered into between petitioners and respondent on March 6, 1880, whereby petitioners' chiefs and headmen promised to use their best endeavors with their people to procure their consent to cede to the United States all their remaining lands in Colorado, after first providing for individual allotments to the members of petitioner bands. In ratifying this agreement, Congress provided that the lands be sold for petitioners' benefit, petitioners to receive the proceeds of the lands after payment of certain expenses to the United States, etc. (Act of June 15, 1880, c. 223, 21 Stat. 199, 1 Kappler 180). The preamble to the Act recited the agreement by representatives of petitioners "for the sale to the United States of their *present reservation* in the state of Colorado" (21 Stat. 199); the original offer or agreement

likewise provided that petitioners would cede to respondent "all the territory of *the present Ute Reservation in Colorado*" (21 Stat. 200). The agreement proposed by the Act of June 15, 1880, was accepted by petitioners. Finding 12, R. 20-22.

The agreement also provided for allotment of a certain amount of the ceded lands to individual members of the Ute Tribe, prior to the sale by the United States of the remaining lands in the reservation. Subsequently, the lands to be allotted to the individuals not having been selected, doubts existed whether settlers could make entry of the lands in former reservation in Colorado. To remove these doubts, Congress declared by the Act of July 28, 1882, c. 357, 22 Stat. 178, 1 Kappler 205, that the lands formerly occupied by petitioner bands other than those set apart for the Southern Utes by the Agreement of 1880, were "public land of the United States," subject to disposal in accordance with the agreement of 1880. Finding 13, R. 22. No sooner had this act been approved than the Commissioner of Indian Affairs (on August 2, 1882) recommended that the lands described in the Executive order of 1875, and which formed a part of the reservation as ceded under the 1880 agreement, be restored to the public domain. Finding 14, R. 22-23. Thereupon, the President, by Executive order of August 4, 1882, 1 Kappler 834, ordered that the land so set apart and so recognized by the Acts of Congress of June 15, 1880, 21 Stat. 199, and July 28, 1882, 22 Stat. 178, as part of petitioners' reservation, "be, and the same hereby is restored to the public domain." Finding 15, R. 23.

So far as are involved the lands added to petitioners' reservation by the Executive order of 1875, the United States has failed completely in its obligation to hold and sell them for the benefit of petitioners. It restored the

lands to the public domain, and thereafter deposited the moneys from sales thereof to its own use and account in the Treasury; and it has neither credited such moneys, nor accounted for them, to plaintiffs. Finding 16, R. 23. This suit was accordingly instituted to recover for the taking of the Executive-order lands.[1]

The Court of Claims dismissed the petition (R. 24). It correctly stated that the question presented was whether there was included in the 1880 agreement, for sale by respondent for petitioners' benefit, the lands which had been added to the reservation by the 1875 Executive order. But it nevertheless held that while, "when these chiefs and headmen entered into the agreement ratified by the Act of June 15, 1880, they no doubt believed that they were ceding to the United States these lands as well as others" (R. 26), still, the United States undertook to sell only "all the lands not * * * alotted [to the Indians], the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States." It therefore regarded as the controlling issue whether the Indians had strict title to the lands by virtue of the Executive order. It thought it plain (although it found no evidence beyond the terms of the agreement of 1880 itself on which to base its conclusion) that Congress was "careful to limit its agreement to sell for the Indians' account those lands to which the Indians had title" and that Congress did not mean

[1] Previously, under a jurisdictional act of March 3, 1909, c. 263, 35 Stat. 781, 788-789, petitioners brought suit against the United States for sales of the ceded lands up to that time; and they ultimately recovered a judgment for the proceeds of cash sales and land reserved for public uses, less offsets and deductions up to July 1, 1910. This recovery did not, however, include any lands lying north of the actual boundary of the reservation established under the Treaty of March 2, 1868, and which were involved in the Executive order of November 22, 1875, with which this case is concerned. Finding 17, R. 23-24.

to ratify and confirm the President's action in setting apart these lands as an addition to the 1868 reservation (R. 28). It thought the action of the Commissioner of Indian Affairs and the Secretary of the Interior in recommending the Executive order of 1882 by which the lands were taken from petitioners (of which complaint is here made) to be administrative interpretations of defendants' ownership of the land (R. 27-29).

An opinion by Judge Littleton (R. 28) reflects with somewhat greater accuracy petitioners' position in that court that the Executive order itself accorded a title to petitioners because it merely effected the intent of the parties in the Treaty of 1868 to grant lands to petitioners farther north than what ultimately proved to be the north boundary of the reservation. However, Judge Littleton disagreed that the Executive order did constitute a settlement of the controversy with respect to the territory at the north end of the reservation, but thought that it merely constituted a temporary withdrawal for Indian purposes similar to that involved in *Sioux Tribe of Indians* v. *United States*, 316 U. S. 317—so that all that the Government could have understood and intended in the Agreement of 1880 was that it was acquiring, to be sold for the benefit of petitioners, only those remaining lands assured to the Indians under the Treaty of 1868.

Specification of Errors to Be Urged

The court erred:

1. In holding that the Executive order of November 22, 1875, did not recognize and settle between petitioners and respondent the title of respondents reserved in their lands in Colorado under the Treaty of March 2, 1868.

2. In holding that petitioners did not acquire title to the lands described in the Executive order of November 22,

1875, either by the terms of that order or under the Treaty of March 2, 1868.

3. In holding that under the agreement ratified by Congress by Act of June 15, 1880, the United States did not undertake and agree to hold the lands described in the Executive order of 1875 for sale for petitioners' benefit.

4. In holding that by the agreement ratified by the Act of June 15, 1880, the Executive order of 1875 was not ratified and confirmed as having vested petitioners with title to the lands therein described.

5. In failing to hold that petitioners are entitled to recover.

Reasons for Granting the Writ

1. The Court of Claims held that while the Indians understood they were ceding the lands involved in the 1875 Executive order to the United States and while the United States knew the Indians had that understanding, nevertheless the United States did not intend to *acquire title* to those lands and therefore the United States did not undertake to hold the lands for sale for the benefit of petitioners. The holding of the Court of Claims is in flat conflict with the unbroken rule in this Court that in agreements between Indian tribes and the United States, the understanding of the Indians always prevails.

On the one hand, the Court of Claims held (R. 26):

> "* * * The Indians were no doubt ignorant of the legal requirements for vesting title in them to a part of the public lands, and so, when they were informed by the Indian Agent that these lands had been added to their reservation, they in all probability believed that they were as much a part of their reservation as were the lands set aside by the treaty of March 2, 1868. So, when these chiefs and headmen entered into the agreement ratified by the Act of June 15, 1880, they no doubt

> believed that they were ceding to the United States these lands as well as others."

But while the court acknowledged (R. 28) that "Congress knew they [petitioners] probably considered these Executive Order lands a part of their 'present reservation,'" nevertheless:

> "It evidently meant to exclude the lands the Indians had been occupying under the Executive Order, but to which they had no title."

Notwithstanding the clear understanding of the Indians into which respondent had led them—and the complete reasonableness of it in the circumstances—the court ruled that they were not entitled to recover because (R. 28):

> "We are clearly of the opinion that the Indians never did acquire title to these Executive Order lands and that the Congress never did agree to sell them for the account of the Indians."

To find that the Indians understood that they owned and were ceding to the United States the lands in question, and that the United States knew of that understanding, but that the contrary intent of Congress (as inferred by the court solely from its own interpretation of the agreement) must prevail, is to run flatly into conflict with the rule of this Court holding that in the interpretation of Indian agreements and treaties the understanding of the Indians must prevail. The rule which this Court has stated time out of mind is that a "treaty must * * * be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones* v. *Meehan*, 175 U. S. 1, 11-12; *Choate* v. *Trapp*, 224 U. S. 665, 675; *Starr* v. *Long Jim*, 227 U. S. 613, 622, 623; *Marlin* v. *Lewallen*, 276 U. S. 58, 64. "How the words of the treaty were understood

by this unlettered people, * * * should form the rule of construction." *Worcester* v. *Georgia*, 6 Pet. 515, 582; *Choctaw Nation* v. *United States*, 119 U. S. 1, 27, 28. "And we have said that we will construe a treaty with the Indians as 'that unlettered people' understood it, * * *." *United States* v. *Winans*, 198 U. S. 371, 380; *Northern P. R. Co.* v. *United States*, 227 U. S. 355, 366-367; *Seufert Bros.* v. *United States*, 249 U. S. 194, 198. Treaties "are to be construed in the sense in which naturally the Indians would understand them." *United States* v. *Shoshone Tribe*, 304 U. S. 111, 116. "It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives. * * *." *Tulee* v. *Washington*, 315 U. S. 681, 684-685. This doctrine of construction applies to agreements made with the Indians since March 3, 1871, under R. S. § 2079 (25 U. S. C. § 71), equally with treaties made prior to that date. *Marlin* v. *Lewallen*, 276 U. S. 58, 64.

2. The entire theory of the opinion below is drawn from one short clause in § 3 of the Act of June 15, 1880. That clause, following a reference to the lands first to be allotted to individual members of petitioner bands, provides that "all lands not so allotted, the title to which is * * * [hereby] released and conveyed to the United States" shall be held for sale as public lands, for petitioners' benefit. Finding 12, R. 21. This language is seized upon as demonstrating that the United States was looking only to those lands to which the Indians could prove an indisputable title—that is, that the lands, instead of being "released" (*i. e.*, quitclaimed) to the United States as the agreement purported to do, were instead conveyed by the Indians upon warranty of good title—so that if the trustee could thereafter prove some anterior title of its own to any part of

the lands, it could take the lands to its own use and benefit free from the trust restrictions. Such a theory gives the United States credit for a prescience which could not exist, having in mind that prior to 1942 it was assumed by this Court that any Executive order creating an Indian reservation conveyed title to the Indians (see point 3 below). It is inconceivable that the language was inserted by the government from a nice appreciation of its rights in the land,[2] or that this phrase could have been included as a springe. Rather, it is obvious that the total purpose of the United States was to free this land from the Indian use and occupancy for the sake of making it available for the productive uses of the whites. To that end, the United States was willing to see the Indians paid a nominal sum and in addition whatever sums the lands they occupied might bring. These Executive-order lands were part of the "present reservation" which the Indians possessed and which the United States was acquiring; part of what the Indians "released" and conveyed to the United States in trust.

3. The Court of Claims has misapplied the opinion of this Court in *Sioux Tribe* v. *United States*, 316 U. S. 317. In that case (in which the earlier authorities are adequately reviewed), four Executive orders were adopted setting apart large tracts of land adjacent to the Great Sioux Reservation established by treaty with the Sioux, which tracts were used by liquor peddlers as a base of operations, as an addition to the present reservation of the Sioux. The purpose of these orders was to render the adjacent land "Indian country" in order to make possible the control of the liquor

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[2] As a matter of fact, in the court below, respondent itself urged the legislative history of the Act of June 15, 1880, to show that the Executive order of 1875 "was at no time mentioned, let alone considered by Congress, although there was discussion of items and matters of far less consequence than the acreage covered by the Executive order." C. Cls. Docket No. 45783, Defendant's Brf., pp. 52-53.

traffic with the Sioux. And after the Indian Liquor Law was extended to make sales of liquor to Indians a crime anywhere, let alone in the Indian country, the tracts were, by Executive order, restored to the public domain. 316 U. S. at p. 322-323. Furthermore, the Indians in that case did not understand that they had acquired any interest in the lands; and by an agreement in 1876, they relinquished and ceded to the United States all their lands (including the Executive-order areas) except a portion of the Great Sioux Reservation therein described. *Id.*, pp. 323-324. The Court held (p. 326) that where lands have been reserved for an Indian tribe by treaty or statute, the tribe must be compensated if the lands are subsequently taken from them; but the executive's power to convey any interest in public lands must be traced to Congressional delegation of its authority, which could not be done in that case.

In the instant case, the acquisition of tribal title to the lands embraced in the Executive order of November 22, 1875, is directly traceable to the authority and action of Congress. Not alone did the Executive order in settling a controversy with the Indians merely carry out the intent of the parties in the Treaty of 1868, but the Executive order addition was ratified by the action of Congress. The parties entered into a formal agreement—the Agreement of 1880—whereby petitioners ceded all the lands in their "present" reservation in Colorado.

The case, then, comes squarely within the ruling of this Court in the *Sioux* case, above (316 U. S. at p. 326) that—

> "• • • where lands have been reserved for the use and occupation of an Indian Tribe by the terms of a treaty or statute, the tribe must be compensated if the lands are subsequently taken from them. *Shoshone Tribe* v. *United States*, 299 U. S. 476; *United States* v. *Shoshone Tribe*, 304 U. S. 111; *United States* v. *Klamath Indians*, 304 U. S. 119."

Moreover, until the decision of this Court in the *Sioux* case in 1942, it had generally been understood and accepted that the titles of Indian tribes under all Executive-order reservations established for their benefit were unassailable. While the previous cases had not involved suits by the Indians against the United States, the language of all the cases indicated no restriction upon the effectiveness of the Executive orders which purported to vest the Indians with the use and benefit of the lands involved. *Spalding* v. *Chandler*, 160 U. S. 394, 402-403; *Re Wilson*, 140 U. S. 575, 577; *United States* v. *Mid-West Oil Co.*, 236 U. S. 459; cf. *Mason* v. *United States*, 260 U. S. 545. It is therefore difficult, in the light of the legal situation which obtained in 1880, to see how the Court of Claims could construe the action of Congress as one "plainly stating" that Congress considered petitioners did not own these Executive-order lands.

The *Sioux* case was decided on the basis of facts showing that the Executive order was merely one of convenience for suppression of liquor traffic and in no other sense for the benefit of the Indians. In the present case the order was intended to vest the Indians with actual use and occupancy of land on which it was understood they resided and which certainly they claimed to own under their earlier treaty with the United States; and it was in their possession until the agreement on which this suit is brought.

4. This suit involves the important question of the good faith of the United States—it having been found that the Indians (who certainly in 1880 could not have even anticipated the decision of this Court in the inapplicable *Sioux* case as to the validity of their Executive-order reservation) reasonably understood that they owned the land, and the United States having undertaken to act as trustee for the sale of the land—whether the United States ought not as

trustee be compelled to account for having unilaterally declared itself owner of the land in 1882. This question of good faith in the Indian affairs of the United States warrants grant of the petition for certiorari. *Creek Nation* v. *United States*, 318 U. S. 629, 631; *Choctaw Nation of Indians* v. *United States*, 318 U. S. 423, 424; *United States* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339, 344.

Conclusion

The petition should be granted.

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